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Supreme Court of the United States

OCTOBER TERM 1966

No. 1078

THE BORDEN COMPANY, A NEW JERSEY CORPORATION,
Petitioner,

vs.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, S. R. SMITH, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, AND G. R. GRANGE, DEPUTY ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,
Intervenor-Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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The briefs in opposition—apart from some rather basic misstatements of fact—serve to demonstrate the importance of the issues presented, not only with respect to USDA but the administrative process generally.

(1) Denial of Any Hearing on Judicial Review.

In *Houston,* where "an elaborate trial on the merits was held," this Court specifically held that a USDA regulation of this type can only be sustained on the basis of substantial evidence *supporting the finding that the proscribed labels are deceptive*—and not merely, as here, "evidence" that food standards are desirable as a general matter.

The Government, however, contends (p. 6) that the *Houston* holding is inapplicable here on the extraordinary ground that it has somehow been overruled by the Administrative Procedure Act.

Surely, if there is any one thing absolutely clear about the APA, it is that Congress was seeking to *broaden* judicial review rather than *reduce* it. This was pointed out by this Court in *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 484, 487 (1951), in which the Court held that the APA expressed a "mood" of "dissatisfaction with too restricted application of the 'substantial evidence' test" and with reviewing courts' willingness to accept agency decisions based on surmise. The Court also admonished (p. 487) that "As legislation that mood must be respected . . . ." The Government's present attempt to circumvent *Houston* on the basis of the APA is in direct conflict with that admonition and with this Court's interpretation of the APA. If anything, the APA has strengthened the *Houston* rule.

Furthermore, when Congress enacted the Administrative Act, it recognized that a judicial hearing was essential where the agency, as here, had decided factual issues with-

out providing a meaningful hearing at the administrative level.*

In any event, when regulations are based on findings of fact, the regulations inherently lack a "rational foundation" if the underlying findings of fact are unsupported by evidence of a substantial character. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224 (1943), and *N. L. R. B.* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 299 (1939).

It is instructive that Campbell seeks to distinguish *Morgan* v. *United States,* 304 U. S. 1 (1938), and *Jordan* v. *American Eagle Fire Ins. Co.,* 169 F. 2d 281 (D. C. Cir. 1948), on the ground they "involve ratemaking which traditionally has always required a trial-type hearing" (p. 19) and "in which a trial-type hearing *at some level* must be afforded to parties whose rates are fixed" (p. 20, emphasis added). Surely, as the *Houston* decision shows, no lesser standard should apply to a regulation which Cir. 1948), on the ground they "involve ratemaking which categorically prohibits—on pain of criminal punishment—a long-established tradename as "false and deceptive." Compare *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951).

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* Referring to Section 10(e)(b)(6), the House Report on the Bill states the governing principle:

> ". . . where a *rule* or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court."

Committee on Judiciary, H. R. Rep. 1980, 79th Cong., 2d Sess. (1946) (emphasis added). The Senate Report is to the same effect. Committee on Judiciary, S. Rep. 752, 79th Cong., 1st Sess. (1945).

(2) Denial of Any Hearing on the Accardi Issue.

The Government does not retract its admission in the Court below that it was the Secretary—not the Deputy Administrator—who actually made the decision. Instead, the Government (p. 9) contends that inquiry on the *Accardi* issue is foreclosed because the regulations were accompanied by a statement that the Deputy Administrator had personally examined the record. Plainly, however, under *Accardi* it is completely immaterial if the subordinate (to whom the decision-making has been delegated) personally examined the record. The question instead is whether the subordinate's decision was dictated by his superiors despite the delegation.

Campbell's response is equally without merit. In defense of the regulations which it drafted and succeeded in having promulgated, Campbell seeks to distinguish the *Accardi* decision, and to justify the denial of any hearing on the issue, on the ground that "The present case involves, not adjudication, but general policy rulemaking" (p. 16). According to Campbell (p. 17): "whatever evidence plaintiff might have offered in the district court about interference by Mr. Grange's superiors in the promulgation of the challenged regulations was totally irrelevant and immaterial."

But the *Accardi* decision affords no support for the notion that the due process principle enunciated there is limited to proceedings which an agency has labeled "adjudicatory," rather than "rule-making." Under fundamental constitutional principles, the question is the impact on the affected parties, not the label chosen by the agency. See *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959). Campbell's argument "has regard to the mere form of the proceeding and ignores realities." *Morgan* v. *United States,* 304 U. S. 1, 20 (1938). For example, *Mor-*

gan involved "legislative" agency action, and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951), involved "executive" agency action. Yet, in both those cases, "the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights." *Hannah* v. *Larche,* 363 U. S. 420, 451-452 (1960).

(3) Denial of Any Opportunity to Rebut Confidential Evidence Relied Upon by USDA.

In seeking to justify the denial to petitioner of any opportunity—either on the administrative level or on judicial review—to rebut the confidential evidence relied upon by USDA in making the underlying findings of fact, the Government goes so far as to assert a prerogative to keep the evidence secret. According to the Government (p. 8), "Since rule-making was involved, the Secretary was not obliged to furnish petitioner with documents upon which he relied."

As already pointed out, the label which an agency chooses to give a proceeding is by no means controlling. For example, although the determination challenged in the *Joint Anti-Facist* case, *supra,* was supposedly "executive" in character, one of the reasons why this Court set it aside was because of the failure of the agency to afford the petitioners an opportunity to meet confidential evidence which it had relied on. See, *e. g.,* 341 U. S. at 170, 171-172 (concurring opinion).

If, as the Government suggests, the decision below is based on the ground that injured parties are not entitled to fundamental procedural protections in a proceeding of this type, it is in clear conflict with this Court's decisions and the need for review by this Court is apparent.

(4) The Tailored "Administrative Record".

The Government asserts (p. 8) that the District Court made an "*in camera* examination of the entire administrative file". *This is completely untrue.* Indeed, Campbell in its brief (pp. 21-22) seeks to justify some of the omissions. And it is precisely because of USDA's refusal to submit to the Court "the entire administrative file"—and its action in submitting only those *parts* of the file that it found to its liking and deleting dozens* of other relevant documents—that petitioner has objected to the "pick and choose" nature of the USDA compilation.** It is indisputable that the so-called "administrative record" filed in this case does not constitute "the whole record" as the Administrative Procedure Act specifically requires.

Other factual assertions by the Government are likewise erroneous. For example, the Government (p. 10) relies on "the testimony of the Special Assistant to the President". *There was no such testimony;* presumably the reference is to a letter (R. 540) which USDA refused to disclose on the ground it was "confidential" (R. 370-372).***

While relying on non-existent testimony, the Government blandly ignores the testimony of the Deputy Administrator that the survey referred to by the Government (p. 5) and Campbell (p. 12) does *not* support the regula-

* Campbell, it should be noted, discusses only the two examples of omitted documents which are specifically mentioned in the Petition for Certiorari (pp. 21-22).

** Furthermore, "*in camera* examination" would in no event constitute proper judicial review of agency findings. The only documents examined *in camera* by the District Court were a few documents which USDA claimed to be privileged and which are not in issue here.

*** The letter, in any event, merely supported in general terms the desirability of establishing food standards.

tions which he issued.* Both the Government and Campbell have also seen fit to ignore the testimony of Hermon Miller, the Director of USDA's Poultry Division and the official who personally supervised the development of these regulations. Mr. Miller testified that the required percentage "was pretty arbitrary"; that "we picked this figure out of the air . . ."; that USDA did not "have any concrete evidence" that the prohibited tradenames are misleading; that "false and deceptive is something we are not positive on because that is something that is not tested"; and that "I don't know that I could say that it is deceptive to the consumer . . ." (R. 114, 205, 126, 116).

Conclusion.

It is respectfully submitted that the petition for certiorari should be granted.

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* Grange Deposition, p. 113.